80878-3

NO. 80878-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ABBEY ROAD GROUP, LLC, a Washington limited liability company; Karl J. THUN and VIRGINIA S. THUN, husband and wife; THOMAS PAVOLKA; and VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND LOUISE LESLIE FAMILY REVOCABLE TRUST,

Petitioners,

v.

CITY OF BONNEY LAKE, a Washington municipal corporation,

Respondent.

BRIEF OF AMICUS CURIAE, WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, IN SUPPORT OF RESPONDENT

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I. INTRODUCTION

Amicus, the Washington State Association of Municipal Attorneys (WSAMA), join in and fully support the arguments raised by the Respondent, the City of Bonney Lake.

II. STATEMENT OF THE CASE[1]

Briefly summarized, the facts are as follows: Petitioner Abbey Road Group, LLC, seeks to construct a 575 unit condominium complex on the severely steep western border of the Bonney Lake plateau. The Bonney Lake Municipal Code (BLMC) allows (but does not require) developers of projects like Abbey Road's to undergo voluntary site development review at the outset of the project. Pendency of site development review does not prevent an applicant from filing a building permit application; the applicant alone decides when to file. *See* BLMC §§ 14.50.060, 14.90.020(D) (setting timing parameters for issuing building permits, but not for filing applications, in relation to other permits).

City officials warned Abbey Road verbally and in writing that site development review would not vest its development in the existing commercial zoning.[2] Rather, to preserve its ability to

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[1] WSAMA incorporates by reference the statement of the case presented by Respondent.

[2] Transcript (2/6/2006) at 14-15; Administrative Record (AR) Exhibit 15.

develop the property—despite an impending rezone from commercial to residential/conservation—Abbey Road would have to file a complete application for a building permit.

On September 13, 2005, the same day Abbey Road filed its application for site development review, the Bonney Lake City Council voted to rezone the property. The rezone was designed to protect the geologically hazardous area and make the zoning consistent with the Comprehensive Plan designation.[3] Residential/conservation zoning allows one dwelling unit per five acres, precluding Abbey Road's high-intensity development.[4]

III. ARGUMENT

A. The Court of Appeals correctly decided Bonney Lake's appeal under the "default" vesting rule set forth in statute and case law.

A municipality can choose to enact an ordinance declaring when developments vest in current land use controls. As long as local vesting ordinances do not conflict with state law, they have been upheld as valid exercises of local land use authority. *See*

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[3] Transcript (2/6/2006) at 7. The Comprehensive Plan had designated the area as a critical geologic hazard area suitable only for low-density development for many years prior to 2005 and no one, including Abbey Road, challenged this designation; it was only a matter of time before the City Council rezoned the property to comply with the Comprehensive Plan. *Abbey Road v. City of Bonney Lake*, Central Puget Sound Growth Management Hearings Board Case No. 05-3-0348 (2005), FDO.

[4] AR Ex. 9.

Erickson & Assoc. v. McLerran, 123 Wn.2d 864, 872 P.2d 1090 (1994). However, nothing requires a city to adopt a vesting ordinance; rather, many cities simply rely upon the "default" vesting rule that has evolved in case law and, more recently, in statutes.

Under the "default" vesting rule, only a complete building permit application, preliminary plat or short plat application, or one of a few other applications vests a development. RCW 19.27.095(1); RCW 58.17.033(1); *Adams v. Thurston County*, 70 Wn. App. 471, 475, 855 P.2d 284 (1993).[5] The filing of other, more preliminary, land use applications, including "umbrella" applications like those for master use permits, does not vest a development. *Erickson*, 123 Wn.2d at 877.

In the last two decades, the Legislature has codified much of the vested rights doctrine. *See* RCW 58.17.033(1) ("A proposed division of land . . . shall be considered under . . . zoning or other land use control ordinances in effect on the land at the time a fully completed application for . . . approval of the subdivision or short

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[5] The vested rights doctrine has been applied to septic tank permits (*Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977)); shoreline permits (*Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974)); and grading permits (*Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973)).

plat . . . has been submitted to the appropriate county, city, or town official"); RCW 19.27.095(1) ("A valid and fully complete building permit application . . . shall be considered under the . . . zoning or other land use control ordinances in effect on the date of application"); RCW 36.70A.302(2) ("A determination of invalidity [by the Growth Management Hearings Board] . . . does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county"). Notably, the Legislature did not make filing a site development review application a vesting event.

Furthermore, the courts have never declared that the site development review process vests a project. In fact, this Court has held the opposite. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 639, 733 P.2d 182 (1987) ("[A]s a general principle, we reject any attempt to extend the vested rights doctrine to site plan review"). Thus, pursuant to well-settled case law and statute, Abbey Road's development did not vest. To vest the project, Abbey Road needed to file a complete building permit application. It never did so, and as a result, its development is precluded.

Not vesting a project at the site development review stage makes sense. A developer's investment in site review, when

compared to the total cost of constructing a large-scale development, is relatively minor. In addition, vesting projects at such an early stage would wreak major havoc on local land use controls. Just over a decade ago, this Court warned how vesting developments too early could compromise the public interest:

> Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson, 123 Wn.2d at 873-74.

Municipal land use controls, often adopted to conform to new scientific evidence and emerging social and environmental norms, will be put in jeopardy if the vesting doctrine is judicially extended to site development review. Cities like Bonney Lake likely declined to adopt vesting ordinances in the conscious belief that the vested rights doctrine, as it currently exists in case law and statute, already strikes a proper balance between private and public interests. Vesting developments at too early a stage will tip the scales too far in favor of developers, who will then have an incentive, and license, to use the permit process for land

speculation. It is improper to tip the balance away from the public interest simply because one group of developers claim that they detrimentally relied on a city process. *See, e.g., Hull v. Hunt*, 53 Wn.2d 125, 130, 131 P.2d 856 (1958); *Erickson*, 123 Wn.2d at 874; (rejecting detrimental reliance test for vesting in favor of a default rule achieving fairness and certainty).

B. The court of appeals opinion in *Victoria Tower* does not conflict with the well-settled default vesting rule.

In an attempt to portray the law as unsettled, Abbey Road cites to *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987). *Victoria Tower* conflicts with neither *Erickson* nor the subsequently-enacted vesting statutes, and the case does not hold that filing an application for site development review vests a project. In *Victoria Tower*, the court of appeals used unfortunately loose language that made it difficult to tell whether the vesting event was a master use or building permit application. However, the only fair reading of the case, in the context of the traditional law, is that the building permit application, not the MUP, vested the development. The court declared:

> [D]evelopers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and

> building ordinances in effect at the time of the application.

Id. at 760. Nowhere did the court state that anything short of a complete building permit application vests a project. Thus, *Victoria Tower* is perfectly consistent with the later-enacted statutes, as well as with the subsequent Supreme Court decisions in *Erickson*. Loose language notwithstanding, a building permit application remains the "event certain" for vesting purposes.

C. Any change in the vested rights doctrine should come from the Legislature, not the courts.

The Court of Appeals in this case correctly determined that under existing case law and statutes the Abbey Road development was not vested. Extending the vesting doctrine beyond its current parameters is a job for the Legislature, not the courts. Washington courts have long recognized that the goal of the vesting doctrine is to achieve uniform rules, not to weigh on a case by case basis whether any particular developer suffered financial harm. *See, e.g.*, *Hull v. Hunt*, 53 Wn.2d 125, 130, 131 P.2d 856 (1958); *Erickson*, 123 Wn.2d at 874. Establishing uniform vesting events that apply state-wide—absent a legislatively-authorized local vesting ordinance—is a job perfectly tailored for a Legislature, especially when the Legislature has twice shown that it is capable of adopting

clear vesting rules. *See* Roger D. Wynne, *Reclaiming Vested Rights*, 24 Seattle U. L. Rev. 851, 916-39 (2001) (advocating for the Legislature to adopt within RCW 36.70B a uniform "applicable law rule" to replace the common law vested rights doctrine).

More than a decade ago, this Court advocated for judicial restraint in matters of land use law in which the Legislature has shown an inclination to act. The Court stated:

> Given the substantial legislative activity in land use law, we are unwilling to modify or expand the vested rights doctrine unless it is required to protect the constitutional interests at stake.

Erickson, 123 Wn.2d at 876; *see also Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997) ("The *Erickson* case stands for the proposition that this Court will not extend the vested rights doctrine by judicial expansion.").

In recent decades, the Legislature has become more and more involved in local land use controls—both enacting specific rules and setting forth parameters for local land use regulations. *See, e.g.*, RCW 19.27.095(1) (applying vesting to building permit applications); RCW 58.17.033(1) (applying vesting to subdivision applications); Chapter 36.70A RCW (the Growth Management Act); Chapter 36.70B RCW (the Planning Enabling Act); Chapter 36.70C (the Land Use Petition Act); and RCW 82.02.050 et seq.

(authorizing impact fees). Given this strong Legislative activity, the courts should exercise restraint when contemplating whether to expand state-wide land use laws beyond their current reaches.

To date, the Legislature has never chosen to extend vested rights to the cursory reviews triggered by site development review applications. The Legislature clearly knows how to declare vested rights, having done it twice before. This Court should interpret the Legislature's silence as a declaration that current vesting statutes, along with controlling Supreme Court precedent in *Erickson* and *Valley View*, strike the proper balance between public and private interests. The decision sought by Petitioners–that vesting occurs earlier than the legislature provided—is inconsistent both with evident legislative intent and prior decisions of this Court. The Petitioners contend that local municipalities should adopt vesting ordinances, rather than relying upon the default rule, so that developers will not have to "decipher fifty years of haphazard vested rights case law."[6] This amicus curiae agrees that legislatures are best equipped to adopt uniform vesting rules. But if, on the other hand, the Legislature is not inclined to adopt a new rule, then neither should this Court.

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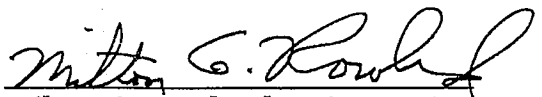
[6] Petitioner for Review at 7.

IV. CONCLUSION

The "default" vested rights doctrine, upon which many Washington cities continue to rely, clearly states that developments like Abbey Road's do not vest until a complete application for a building permit is filed. Because Abbey Road never filed a complete building permit application, despite its ability to do so, its development never vested in the former commercial zoning. The Court of Appeals decision is perfectly consistent with decades of case law and the Legislature's more recent codifications of the vesting doctrine.

Given the strong Legislative activity in land use law in the last two decades, any expansion of the vesting doctrine has become the purview of the Legislature, not the Courts. Because Abbey Road calls for judicial expansion of vesting, its Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 9th day of January, 2008.



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